

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Glenn Snider SIMMONS 43431

DECISION OR THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2411

Glenn Snider SIMMONS

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.30-1.

By order dated 2 July 1984, an Administrative Law Judge of the United States Coast Guard at Alameda, California, suspended Appellant's license for one month outright upon finding proved the charge of negligence. The specification found proved alleges that while serving as Operator aboard the M/V AMERICAN EAGLE, under the authority of the captioned document, on 20 May 1984, while the vessel was navigating San Francisco Bay in the vicinity of the San Francisco - Oakland Bay Bridge, appellant failed to take adequate precautions to prevent a collision with the S/V FINE FEATHER resulting in a collision with and the sinking of that vessel.

The hearing was held at Alameda, California, on 2 July 1984.

At the hearing Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence six exhibits and the testimony of three witnesses.

In defense, Appellant introduced in evidence three exhibits, his own testimony, and the testimony of one additional witness.

After the hearing the Administrative Law Judge rendered a decision in which he concluded that the charge and specification had been proved, and entered a written order suspending all licenses and documents issued to Appellant for a period of one month outright.

The complete Decision and Order was served on 13 July 1984. Appeal was timely filed on 6 July 1984 and perfected on 21 June 1985.

FINDINGS OF FACT

At all relevant times on 20 May 1984. Appellant was serving as Operator aboard the M/V AMERICAN EAGLE under the authority of his license which authorizes him to serve as Operator of Uninspected Towing Vessels. The M/V AMERICAN EAGLE is a steel hulled towing vessel of 193 gross tons, 106.5 feet in length. The AMERICAN EAGLE, pushing an empty steel dump" barge ahead, was underway on San Francisco Bay Bridge (Bay Bridge) enroute to its moorings at Oakland, California. The weather was clear. Two deckhands were on the bridge with Appellant helping him look for traffic. Neither man, however, was designated as a lookout.

A Vessel Traffic Separation Scheme was in effect in San Francisco Bay establishing traffic lanes for Northbound and Southbound vessel traffic moving under the Bay Bridge. The M/V AMERICAN EAGLE was originally in the Southbound Traffic Lane but Appellant, after advising the Vessel Traffic Service of his plans, changed course, leaving the Southbound Traffic Lane and crossing the separation line into the Northbound Traffic Lane enroute to his destination.

Meanwhile, the S/V FINE FEATHER, operated by Mr. Richard Lane, an experienced sailor, was underway in the general area of the Bay Bridge. Mr. Lane observed the AMERICAN EAGLE coming southbound, and, assuming the AMERICAN EAGLE would continue in the Southbound Traffic Lane, turned the FINE FEATHER in a northeasterly direction to move away from the Southbound Lane and the approaching AMERICAN EAGLE. At this time, the wind had died and the maneuverability of the FINE FEATHER was reduced to the extent that Mr. Lane could only turn the vessel by using the rudder in a sculling manner. As the AMERICAN EAGLE, making a speed of 7 to 8 knots, closed on the FINE FEATHER, Mr. Lane stood up on the seat of his vessel and began waving his arms in an attempt to attract the attention of personnel on the tug. He also sent the message "No Motor" by using his arms to semaphore.

Although Appellant had earlier seen the FINE FEATHER approximately two or three miles ahead, neither he nor either of the other two men on the bridge kept a watch on the vessel. Appellant did not see the FINE FEATHER again until he suddenly saw the top 6 or 7 feet of the mast and sail approximately 100 to 150 feet ahead of the barge. Appellant immediately reversed engines and put the rudder over so as to swing the barge's bow to starboard in an effort to clear the

FINE FEATHER. The AMERICAN EAGLE slowed slightly and the barge's bow began to swing, but the two vessels collided some 10 or 15 seconds later, at about 1336. The barge rode over and sank the sailing vessel. Mr. Lane jumped clear, and was rescued by a nearby sailboat.

BASIS OF APPEAL

Appellant contends that the Coast Guard failed to establish subject matter jurisdiction in this case, since the Administrative Law Judge improperly concluded that he was acting under the authority of his Coast Guard license. He argues that the pertinent Coast Guard regulation, 46 CFR 5.01-35, provides an ultra vires delegation of Coast Guard rulemaking authority to private employers since the regulation provides in part that an individual is acting under the authority of his license when the holding of the license is required as a condition of his employment. He argues further that if the Coast Guard has authority for this purported delegation, the agency has failed to establish standards for private employers to follow and that therefore the regulation is vague and unconstitutional.

OPINION

I

Appellant contends that the Coast Guard failed to establish subject matter jurisdiction. I do not agree.

Jurisdiction in this case is premised on the statutory mandate that a towing vessel be under the direction and control of a licensed operator. Title 46 USC 8904 provides, in pertinent part:

A towing vessel that is at least 26 feet in length...shall be operated by an individual licensed by the Secretary to operate that type of vessel...

At the hearing, it was clearly established that Appellant was serving as Operator of a 106.5 foot towing vessel at the time of the collision. Accordingly, the statute establishes jurisdiction.

However, Appellant's argument that a particular license is required as a condition of employment is also without merit. 46 CFR 5.01-35(a) provides, in pertinent part, that "(a) person employed in the service of a vessel is considered to be acting under the authority of a license ... when the holding of such license ... is required in fact as a condition of employment."

Properly promulgated regulations have the force and effect of law in suspension and revocation proceedings. Appeal Decision 1944 (HAYNIE). The "under the authority of the license" element of jurisdiction is supported by a showing that the holding of a license was a condition to employment. Appeal Decision 2268 (HANKINS). See also Appeal Decision 2393 (STEWART). Here, counsel for Appellant stipulated at the hearing to the admission of a letter from Appellant's employer which states that Appellant has a valid Coast Guard license as a condition of employment, and the Administrative Law Judge correctly determined that Appellant was acting under the authority of his license at the time of this incident.

II

Although not specifically raised by Appellant, one further matter should be addressed.

The specification upon which the hearing proceeded alleged only that Appellant was negligent in failing to take adequate precautions to prevent a collision. Under 46 CFR 5.05-17(b), such a specification is inadequate to enable the person charged to identify the offense so he will be in a position to prepare his defense. See Appeal Decisions 2358 (BUISSET), 2386 (LOUVIERE), and 2396 (McDOWELL). A negligence specification must allege particular facts amounting to negligence, or sufficient facts to raise a legal presumption which will substitute for particular facts. See also Appeal Decisions 2277 (BANASHAK) and 2174 (TINGLEY), *aff'd sub nom., Commandant v. Tingley* NTSB Order EM-86 (1981).

However, deficiencies in pleading in administrative proceedings can be cured where the record clearly shows that there was no prejudice. "(T)here may be no subsequent challenge of issues which are actually litigated, if there was actual notice and adequate opportunity to cure surprise." *Kuhn v. Civil Aeronautics Board*, 183 F.2d 839, 841 (D.C. Cir. 1950). Here, Appellant raised no objection and all issues were fully litigated. It is clear from the record that Appellant and his counsel were aware of the government's case and were prepared to defend against it. After all issues were fully litigated, the Administrative Law Judge found that Appellant failed to take adequate precautions to prevent a collision through his maneuvering of the M/V AMERICAN EAGLE so as to depart from the Southbound Traffic Lane, and his failure to maintain an alert lookout. Appellant does not now complain about the adequacy of the specification.

Since there has been no prejudice to Appellant, and he did not complain of the adequacy of the negligence specifications, it need not be set aside. See LOUVIERE, supra.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge dated at Alameda, California, on 2 July 1984 is AFFIRMED.

B.L. STABILE
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 17th day of October 1985.

***** END OF DECISION NO. 2411 *****